IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES RILEY, JR., and
FRANK MARSHALL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,511

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

SUBJECT INDEX

CASE INDEX

STATUTE

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES RILEY, JR., and
FRANK MARSHALL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,511

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts and adopts the Appellants' Jurisdictional Statement of Facts with the following additions. Both Appellants received a sentence of ten years on each count, said

sentences to run concurrently. The Trial Court set bail on appeal at $25,000.00 for each Appellant. Both Appellants are in custody. At trial, the Appellants' counsel was retained by both Appellants, and on appeal trial counsel was appointed under the Federal Criminal Justice Act (18 U.S.C.A., §3006A) to represent Appellant Frank Marshall. He is still retained counsel for Appellant James Riley, Jr.

(Hereinafter the Transcript of the Record, Volume I will be referred to as "RC"; the Reporter's Transcript of the testimony at trial will be referred to as "RT," the Reporter's Transcript of the testimony at the hearing of the Motion to Suppress will be referred to as "M RT"; the number following "RT" or "M RT" will refer to the page, and the number following "L" will refer to the line of the page. Appellant James Riley, Jr., will be referred to as "Defendant Riley" or "Riley" and Appellant Frank Marshall will be referred to as "Defendant Marshall" or "Marshall.")

II.

STATEMENT OF FACTS

In the early hours of the morning of May 17, 1967, Customs Agent John H. Dennis received a telephone call from a Nogales, Arizona, police sergeant reporting his suspicions regarding three persons occupying an automobile parked on Grand Avenue, Nogales, Arizona (RT 100-102). Dennis promptly went to the scene and located the vehicle (RT 132). While he had the vehicle under observation, it was moved to several different locations in Nogales, Arizona; the occupants left the vehicle on a number of occasions, sometimes only one occupant leaving and sometimes two leaving (RT 132-133). Dennis observed one occupant make several telephone calls from a booth in the Safeway Store parking lot, about 100 yards from the main gate into Mexico; and he observed the same

person making telephone calls from other booths located about the City of Nogales, Arizona (M RT 16). The three occupants of the vehicle were Negro males, Clifford Gray, Billy Joe Campbell, and Kelvin D. Reed (RT 132). During the course of his surveillance, Dennis telephoned Customs Agent Horace Cavitt for assistance and, upon arrival, Cavitt noted some of the movements of the vehicle and the actions of its occupants (RT 131).

About 4:00 p.m. on May 18, 1967, Dennis observed the same automobile parked again on Grand Avenue in approximately the same location at which it was in the early morning of May 17 (RT 133). At that time, the occupants of the vehicle were Kelvin D. Reed and two other colored persons, defendant James Riley, Jr., and a woman, Janet Johnnie Stanley (RT 134). While Agent Dennis, with Customs Agent Washington and Customs Port Investigator Turner, had the automobile under observation from about 4:00 p.m. to midnight, Dennis observed the occupants sitting in the car for hours at a time, with one or more of them leaving and returning to the car on occasion (RT 135). At one time, when a police officer came close to the car, defendant Riley and Miss Stanley left the car, entered a bus station, watched the police officer through a window for a short time, and then returned to the car (RT 135). About 8:00 p.m., Dennis observed dedefendent Riley and Miss Stanley leave the car and walk into Mexico through the Grand Avenue entrance gate. While Riley and Miss Stanley were in Mexico, Dennis observed that Reed left and reentered the car numerous times, walking up and down Grand Avenue (RT 135). About midnight, Dennis saw defendant Riley and Miss Stanley reenter the United States from Mexico and walk, by a circuitous route, to where the automobile was parked, meeting Reed at the automobile (RT 135). Dennis observed that after the three talked in the car, Reed

left the car, walked to the corner, and entered a taxicab, getting into the front seat beside the driver (RT 136). When Reed entered the taxicab, a Mexican male was in the rear seat; and after about five minutes elapsed, the taxicab drove to its stand near the Grand Avenue entrance to Mexico, where Reed left the cab (RT 136). Then, Dennis observed Reed return to the automobile in which he had left defendant Riley and Miss Stanley, reenter the car, and remain there briefly (RT 137). Dennis then saw Reed leave the automobile and walk north on Grand Avenue about one and one-half blocks to the northwest corner of Arroyo and Crawford Streets (RT 137). About the same time, Dennis observed defendent Riley and Miss Stanley in the automobile, Miss Stanley driving, circle the block twice and pick up Reed at the corner of Arroyo and Crawford Streets the second time around the block (RT 137). Dennis then observed the automobile depart Nogales and go north on Highway 89 toward Tucson (RT 137-138). Dennis and Customs Port Inspector Turner followed the automobile for a distance but, having the belief that the occupants had not picked up any contraband, they discontinued the surveillance (RT 138).

About May 21, 1967, Agent Cavitt received information from a reliable informant that two colored males, associates of Billy Joe Campbell, who is known to Cavitt as a narcotics trafficker, were negotiating with a Mexican, Pancho Martinez, at Nogales, Sonora, to buy a large amount of heroin from Martinez (M RT 36-37). The reliability of the informant is attested by the fact that seizures of narcotics and arrests had resulted in about 20 of 25 occasions in the past when the informer furnished information to Agent Cavitt (M RT 37). A few days later, the informant told Cavitt that the colored males had taken six ounces of heroin from Nogales, Sonora, to Chicago, Illinois, and that they would return to Nogales,

Arizona, on Monday, June 5; that Pancho Martinez was going to Culiacan to pick up some narcotics and would bring them back to Nogales, Sonora, and meet the colored males with it about June 5 (M RT 38). Shortly after receiving this information, Agent Cavitt passed on to Agent Dennis the part about two colored males having taken six ounces of heroin from Nogales to Chicago; and on May 27, Cavitt repeated that information to Dennis and also told Dennis of the word he had obtained that Pancho Martinez had gone to Culiacan to obtain narcotics which two colored males desired to purchase, and that the colored men would be back in Nogales, Arizona, on June 5, 1967 (M RT 22).

On Monday, June 5, 1967, Customs Agent Holgerson, whom Dennis had asked to be alert for the presence in Nogales of two colored males whom Dennis described, informed Dennis that he believed he had seen these men making a phone call from a booth in front of the Mission Motel on Grand Avenue in Nogales, Arizona (M RT 22-23). Dennis, with Agent Cavitt, promptly went to the Mission Motel and, describing two colored males to the manager, asked if they were registered there (M RT 23). The manager stated he had a party of three Negroes registered and exhibited the registration cards of Mr. and Mrs. James Riley, Jr., and another card on which the registrant's name was illegible (RT 138). Thereafter, Dennis learned that the rooms assigned to the registrants were occupied by defendants Riley and Marshall and Miss Stanley (RT 138).

During the morning of June 5, Dennis observed defendants Riley and Marshall, with Miss Stanley, in a yellow Ford Mustang bearing Arizona plates and, by checking, Dennis learned that the automobile was a rental car (RT 139). About noon of June 5, Dennis observed defendants and Miss Stanley in a second rental car, a blue Ford Fairlane, pulling into the Mis-

sion Motel (RT 139). He observed that they stopped at the Mission Motel only briefly, picked up a bag, and then proceeded north out of Nogales on Highway 89 (RT 139). Dennis, accompanied by Agents Cavitt and Washington, and Customs Agent-in-Charge Cameron, followed in automobiles and, although no report had been received by Cavitt from his informant that defendants had actually purchased narcotics from Pancho Martinez, the agents stopped the vehicle occupied by defendants and Miss Stanley at a point about 90 miles from Nogales, Arizona (M RT 24-25; RT 140). The agents took the vehicle and its occupants to the Sheriff's Office at Marana, Arizona, a short distance from where the agents stopped the vehicle, and there searched the defendants and the vehicle (RT 140). The search disclosed no contraband but did disclose that the defendant Riley was carrying on his person approximately $5,000 in cash (RT 248).

On June 6, 1967, Agent Dennis, while attending the United States District Court in Tucson, received a message from the Customs Agency secretary at Nogales, Arizona, that the manager of the Mission Motel had advised her that the defendants had returned to Nogales and had registered at the motel at approximately 1:00 a.m. that day (M RT 25-26; RT 33). In the early evening of June 6, Agent Dennis observed the defendants, carrying some curios, come to the Mission Motel in a taxicab bearing Mexican license plates (RT 142-143). He observed defendants enter their motel rooms and soon return to join Miss Stanley on the motel veranda (RT 142-143). Soon thereafter, Dennis saw the defendants begin making telephone calls from the booth outside the motel, making in all about ten calls (RT 143). At approximately 10:00 p.m., a taxicab bearing Arizona plates came to the motel and the defendants and Miss Stanley entered it, carrying one bag (RT 144). Dennis then observed defendants put Miss

Stanley on a northbound bus which departed Nogales, Arizona (RT 194). Thereafter, Dennis observed the defendants return in the taxicab to the Mission Motel, where the cab stopped momentarily, and then, without either defendant having left the cab, it returned to the bus station (RT 144). Dennis then saw the defendants alight from the taxicab and walk into Mexico (RT 144).

On June 6 or 7, after the search of the defendants at Marana, Agent Cavitt's informant advised him that Pancho Martinez had not as yet returned to Nogales from his trip to Culiacan for narcotics but that the informant would watch Martinez's house for his return and would notify Cavitt immediately upon his return (M RT 39). On June 7, the same informant telephoned the Customs Agency Office at Nogales, Arizona, and, when Agent Cavitt was unavailable, informed Agent Washington that "two colored guys," describing them so that Washington readily identified them as the defendants, were in Nogales, Sonora, waiting for the return of Pancho Martinez (M RT 81). Washington promptly informed Cavitt of the call and what the informer had told him (M RT 81). About 6:00 p.m. on the same day, the informant telephoned Cavitt and told him that Martinez had returned to Nogales, Sonora, and had "sold those guys that stuff" and that Martinez had 50,000 pesos ($4,000) (M RT 81-82). Because of his talk with Agent Washington earlier that same day, when the informant described the sale from Martinez to "those guys," Cavitt knew the informant had reference to the defendants (M RT 81-82). Immediately after receiving the telephone call, Cavitt communicated with Agent Washington by radio and gave him the information he had received from the informant regarding the sale by Martinez to the defendants (M RT 81-82).

On June 7, 1967, about 6:00 p.m., while Agent Dennis was in his automobile on the Tucson-Nogales Highway, at a

point about 35 miles north of Nogales, he observed defendants in a Nogales, Arizona, taxicab being driven in a northerly direction towards Tucson (RT 145). Dennis, of course, had in mind the fact that he had been informed earlier that defendants would return to Nogales about June 5 to deal with Martinez in Nogales, Sonora, for narcotics; that defendants had actually appeared in Nogales on June 5, 1967; that he had seen defendants in Mexico on the preceding night, June 6; and that defendants were then engaged in the rather singular episode of traveling *by taxicab* from Nogales apparently to Tucson, a distance of 67 miles over a route served by public bus transportation (RT 145-146). Accordingly, Dennis turned his vehicle and followed the taxicab, calling State Narcotics Agent Dunn by radio and asking him to pick up Customs Agent Anderson at Tucson and to meet him on the Nogales Highway (RT 146). About that time, Dennis received by radio from Agent Washington the information that Washington had obtained from the informer, viz: that narcotics dealer Martinez had returned to Nogales, Sonora, and had sold defendants narcotics for the sum of $4,000 (M RT 82).

When Agents Dunn and Anderson met Agent Dennis on the Tucson-Nogales Highway, the three agents followed defendants in their taxicab to the Tucson Greyhound Bus Depot (RT 146-147). There, as defendants were alighting from the taxicab, the agents identified themselves, "patted down" the defendants for weapons and, since a crowd was gathering, took them to the Tucson offices of the State Narcotics Agency, the defendants being transported in the car of Agent Dunn (RT 147-148). Dunn examined his rear car seat before the defendants got in to make sure the seat was empty in order to make sure there was nothing they could get their hands on (RT 224). After they got in the car and while waiting for Agent Dennis, Dunn saw Marshall place his hand under his

shirt and move his hand under his shirt to the right rear (RT 224). At these offices, the persons of the defendants were searched without result but, while the search was being conducted, Agent Dunn, whose eyes had not left his vehicle and who had called Dennis' attention to the package he saw on the seat after Defendants got out, examined his automobile and found, in the seat which defendants had occupied during the trip from the Greyhound Bus Depot, three packages of heroin (RT 226-227). When the heroin was brought to the room in which defendants were being searched, defendants were then informed that they were under arrest (RT 286). Agent-in-Charge Cameron gave this information to defendant Riley, informing him that he was under arrest for smuggling narcotics; that he did not have to make any statement; that any statement he might make could be used against him in court; that he was entitled to an attorney; and that if he could not afford one the Government would provide one for him (RT 286-287). At that time, defendant Riley started to speak to Agent Cameron and was advised by Cameron to keep silent. Nevertheless, defendant Riley said to Agent Cameron, "Did those Mexicans turn me in?" (M RT 83-84; RT 287) Then, addressing Agent Washington, defendant Riley said, "You don't give up, do you?" (RT 84)

Government's exhibit 22 contained 60% pure heroin weighing approximately 5.2 ounces (RT 268-269).

III.

OPPOSITION TO SPECIFICATIONS OF ERROR

1. There was evidence against both defendants of a crime shown.

2. There was circumstantial evidence of actual possession by defendant Marshall and of constructive possession by defendant Riley.

3. There was no error in admitting the five and one-half ounces of heroin into evidence.

4. There was no error in sustaining the Government's claim of privilege and refusing to order the Government to reveal the name of the informer.

5. There was no error in admitting into evidence the statement of Riley and no cautionary instruction to the jury.

6. There was no fatal variance between the dates set out in the Indictment and the proof adduced at the Motion to Suppress and at Trial.

7. There was no error in the Court's ruling the said heroin was abandoned.

8. There was no error in submitting the case to the jury against both defendants.

9. There was no error in denying defendants' Motion for New Trial or for Mistrial.

IV.

SUMMARY OF ARGUMENT

1. The two searches of defendants on June 5, 1967 and on June 6, 1967, were based upon probable cause.

2. There were no grounds given by defendants to override the Government's claim of privilege against revealing the name of the informer.

3. There was no error in admitting Riley's statement based on Government counsel's argument and the Court's instructions to the jury.

4. There was sufficient evidence as to both defendants for a jury to find proof of guilt beyond a reasonable doubt.

5. There was no error in Government counsel's argument.

6. There was no fatal variance between the dates charged in the Indictment and the proof adduced at trial.

V.

ARGUMENT

1. The two searches of defendants on June 5, 1967 and on June 6, 1967, were based upon probable cause.

Appellants argue lack of probable cause at pages 23 to 27 of their Opening Brief. The Trial Court issued a written opinion in ruling on the Motion to Suppress, entered and filed August 16, 1967 (RC Item 15). The Trial Court's Findings and Decision on Motion to Suppress covered eleven pages. The Findings will not be repeated but are set out in the Statement of Facts herein verbatim. The only additions to the Court's findings in the Statement of Facts are indicated by underlining and are the identification of the contents of Government's exhibit 22, the 5.2 ounces of 60% pure heroin, and Dunn's observations of the car seat and Marshall's movements. This testimony was not offered at the Motion to Suppress. Omitted from the Statement of Facts but contained in the Court's Findings was the following paragraph at the beginning:

> "In appraising the validity of the acts and conduct of the Customs officers which are involved in the Motion to Suppress in this case, it must be borne in mind that the officers know, as this court knows, that Nogales, Arizona, is one of the principal points on the United States-Mexico border at which the illegal importation of narcotics is constantly attempted, successfully and unsuccessfully; that in the year July 1, 1966, to June 30, 1967, over 200 arrests have been made for narcotics violations at Nogales, a very high per cent thereof resulting in convictions; and

that in connection with these arrests, very substantial amounts of heroin, marihuana, and other drugs have been seized at Nogales." (RC Item 15, 1st page)

At page 6 of the opinion after the Court found defendant Riley was carrying approximately $5,000.00 in cash, the Court found:

"The facts and circumstances within the knowledge of the Customs officers and of which they had reasonably trustworthy information at the time they stopped and detained the defendants at Marana were sufficient in themselves to warrant men of reasonable caution in the belief, and the officers did believe, that defendants were committing the offense of transporting narcotics which had been imported into the United States unlawfully and which the defendants knew had been imported unlawfully." (RC Item 15, page 6)

The Court, beginning at page 10, went on to find:

"The facts and circumstances within the knowledge of Agents Dennis, Anderson, and Dunn and of which they had reasonably trustworthy information at the time they stopped and took control of the movements of defendants at the Greyhound Bus Depot were sufficient in themselves to warrant men of reasonable caution in the belief, and the agents did believe, that defendants were committing the offense of transporting narcotics which had been imported into the United States unlawfully and which defendants knew had been imported unlawfully.

"The court concludes and holds as a matter of law:

"1. That the stopping and detention of the defendants by the customs officers at Marana, Arizona, on June 5, 1967, was an arrest of defendants, although defendants were not advised they were under arrest and although, in fact, they were advised that they would be arrested if contranband were found in their vehicle.

"2. That the arrest of the defendants and the search of defendants at Marana was valid and lawful.

"3. That acts of the agents in taking the defendants into custody at the Greyhound Bus Depot on June 7, 1967,

was an arrest, notwithstanding defendants were not informed that they were under arrest until after the heroin was found in Agent Dunn's automobile.

"4. That the arrest and search of defendants on June 7, 1967, was valid and lawful.

"5. That the heroin involved in this case was not found as the result of any search of defendants but was abandoned by defendants in Dunn's automobile and discovered by Dunn when he examined his automobile. Accordingly, the seizure of the heroin was valid and lawful and will not be suppressed.

"6. That the questions defendant Riley addressed to Agents Cameron and Washington at the Tucson offices of the Arizona narcotics agency on June 7, 1967, were voluntary acts on the part of defendant Riley, done against the advice of Agent Cameron, and were not the product of questioning by the agents, or any of them. Accordingly, such questions will not be suppressed.

"The premises considered,

"IT IS ORDERED that defendants' Motion to Suppress is denied." (RC Item 15, pages 10-11)

As was pointed out by Appellants' Opening Brief at page 23, *Brinegar v. United States* (1949) 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, does contain a definition of probable cause. It is asserted that it is as good a definition as any. It is respectfully submitted that it is the U.S. Supreme Court's last word on it. See *McCray v. Illinois* (1967) 386 U.S. 300, 18 L.Ed. 2d 62 at p. 67, 87 S.Ct. 1056. At page 175, the Supreme Court states:

". . . Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States,* 267 U.S. 132, 162[15]."

The Trial Court found as set out above that the "facts and circumstances within the knowledge of" the arresting

agents "and of which they had reasonably trustworthy information at the time they stopped and took control of the movements of defendants at the Greyhound Bus Depot were sufficient in themselves to warrant men of reasonable caution in the belief, *and the agents did believe,* that defendants were committing the offense of transporting narcotics which had been imported unlawfully and which defendants knew had been imported unlawfully." (RC Item 15, page 10) (Emphasis supplied)

The Trial Court made this finding after finding facts describing what the agents had observed, either or both of defendants' movements in the Nogales-Tucson area, May 18 to June 6, 1967.

Appellants argue there should be corroboration of the informer's information. Surely the movements of defendants around Nogales, the hiring of a taxi from Nogales to Tucson, some 67 miles, when public bus transportation was available, and the defendants' own appearance which stood out in a small community like Nogales, Arizona, constituted corroboration.

Appellants then argue that the Trial Court weakened his finding of probable cause by the finding that the property was abandoned on the car seat. How this finding by the Trial Court weakens the Trial Court's finding of probable cause cannot be seen. Assuming for the sake of argument that the contraband was found on either of the defendants' person when the defendants had not been told they were under arrest, appellants would then be arguing that the form of the arrest not being lawful, therefore, the search incident thereto was not lawful.

In *Bailey v. United States* (5th Cir., 1967) 386 F.2d 1, at pages 2-3, the Fifth Circuit held:

> "As this was a warrantless search not incident to an arrest, the government either must have a finding that probable cause existed or must excuse its absence by resort to the border search doctrine. No case has held that one

who has not crossed an international boundary can be the object of a constitutionally permissible border search, and we do not reach that question. Rather, we assume the view of the searching officers, and hold that 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief' that appellants were, when searched, possessed of illegal narcotics."

It is respectfully submitted the search was based on probable cause and the testimony of the money on Riley's person on June 5, 1967, and the contraband seized on June 6, 1967, was properly admitted into evidence.

2. There were no grounds given by defendants to override the Government's claim of privilege against revealing the name of the informer.

Appellants argue that the identity of the informer should have been revealed by Defendants' Motion for Bill of Particulars or at the hearing on the Motion to Suppress, at pages 27 to 31 of the Opening Brief.

In the memorandum in support of the Motion for Bill of Particulars at page 2, defendants' counsel states:

> "In narcotics cases, the courts are especially liberal in ordering disclosure of the names of persons involved in the transaction. *United States vs. Vasquez,* 25 F.R.D. 350; *United States vs. Wilson,* 20 F.R.D. 350; *Roviaro vs. United States,* 353 U.S. 53, 1 L.Ed. 2d 639. It would appear since the Government, in its complaint filed against the above-captioned defendants, did not set forth when and in what cases the informant had been reliable in the past but ony made the general assertion that he had been reliable would not, in and of itself, appear to be sufficient evidence of his reliability, and therefore, his identity should be revealed." (RC Item 5)

No affidavit was filed in support of the Motion. In the memorandum, Counsel asserted the Complaint did not set out when and in what cases the previous reliability informant had given information (RC Item 5). The Complaint was filed after the arrest of the defendants. The Government is not limited to the contents of the Complaint in establishing the probable cause for an arrest. *Dearinger v. United States* (9th Cir., 1967) 378 F.2d 346 at page 347.

At the hearing on the Motion to Suppress defendants' counsel sought the revelation of the identity of the Informant again. (See M RT 47, L 4-5, where the Government's counsel claimed the privilege.)

No grounds for setting aside the privilege were shown at the time of the Motion for Bill of Particulars much less at the hearing of the Motion to Suppress.

In *Roviaro v. United States* (1957) 353 U.S. 53, at p. 62, 1 L.Ed. 2d 639, 77 S.Ct. 623, the Supreme Court stated:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In *Sabbath v. United States* (9th Cir., 1967) 380 F.2d 108 at page 110, this Court stated:

> "[2-4] Information from an informer not known to be reliable does not constitute probable cause for an arrest without a warrant. If, however, by the time of the arrest there has been such corroboration of the informer's information to warrant a man of reasonable caution in the belief that an offense has been or is being committed, then probable cause does exist.[3]"

In *McCray v. Illinois* (1967), *supra,* the Supreme Court sustained the claim of privilege in a case decided after *Sabbath v. United States, supra,* where the informant was shown to be previously reliable and the information was credible and the agents believed the information in good faith.

It is respectfully submitted there were and are no grounds to override the Government's claim of privilege against revealing the name of the Informant.

3. There was no error in admitting Riley's statement based on Government counsel's argument and the Court's instructions to the jury.

There is no argument in support of Appellants' Specification of Error Number 9, i.e., "That error was committed in the admission of these statements without a cautionary instruction that the said statements could not be used by the jury against appellant MARSHALL."

At the time the statement of Riley was to be offered, Government's counsel asked for a hearing outside the presence of the jury (RT 277, L 8-22). The hearing on the voluntariness was held (RT 277-285). The contents of that statement was gone into several times (RT 280, L 14-17; 282, L 4-8; 284, L 10-12; 284, L 20-23). No such request was raised by defendants' counsel at the voluntariness hearing (RT 277-285), and the only objection raised by him was voluntariness (RT 282, L 22 to 283, L 20). When the statement was offered in the presence of the jury, no request for such instruction was made by defendants' counsel:

(By Miss Diamos) "Q Then what was said?

"A At that time Mr. Riley looked at me and—

"MR. HEALY: Excuse me. Could the record indicate my objection to the testimony?

"THE COURT: Yes, and the objection is overruled.
"Q (By Miss Diamos) What did Riley ask you?"
RT 287, L 6-11)

Appellants' counsel cannot argue that the statement in the presence of the jury took him by surprise since its contents were gone into four times in the voluntariness hearing.

The Government's counsel argued statement against Riley only (RT 300, L 15-19; 319, L 20-23; 322, L 5-10).

Since Appellants' counsel has not argued this point in its opening brief, no further argument can be made. Suffice it to say, the Trial Court instructed the Jury to consider the evidence as only against the person against whom it was admitted (RT 324, L 5-10; 341, L 1-5) and to determine the guilt or innocence of each defendant separately (RT 324, L 7-9; 340, L 23 to 341, L 5). *Russell G. Courtney v. United States of America* (9th Cir., March 1, 1968) No. 20769 at pages 15-18.

It is respectfully submitted there was no error in the Trial Court not instructing the jury at the time the statement was received to consider it only against Riley.

4. There was sufficient evidence as to both defendants for a jury to find proof of guilt beyond a reasonable doubt.

At pages 15 to 23 of Appellants' Opening Brief, Appellants' counsel argues the sufficiency of the evidence. The State Agent Joe Dunn testified to checking his car seat at the Greyhound Bus Depot in Tucson, Arizona, before defendants entered it to make sure there was nothing the defendants could seize (RT 224-226). He was watching them, while waiting for Agent Dennis to walk around to the passenger seat, and saw Marshall, who was sitting on the right hand side put his hand underneath his shirt and move his hand under his shirt to the right rear and as Dennis got in heard Dennis tell

them "put your hands on your knees." (RT 226-227) When they arrived at the State Office Building, he noted seeing the package as the Defendants got out and kept his eyes on the car until he recovered the package (RT 226-228). Surely, this is circumstantial evidence of the actual possession by Defendant Marshall. The evidence on appeal must be construed in the light most favorable to the Government. *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *Schino v. United States* (9th Cir., 1953) 209 F.2d 67 at p. 72.

This, coupled with Marshall's movements on June 5 and 6, 1967, as set out in the facts are sufficient to find proof beyond a reasonable doubt.

Defendant Riley's statement at the time of arrest, after Cameron had advised him as to his rights and had cautioned him to remain silent as he tried to speak, "Did those Mexicans turn us in?", was surely sufficient when viewed with the evidence of his movements from May 18, 1967, and on through June 6, 1967, including his possession of approximately $5,000.00 in cash the day before, the change in the rented cars on June 5 and June 6, 1967 (RT 31, L 24 to 32, L 1; 66 L 16-17; 76, L 11-14; 93-95). Riley gave the reason on turning in the yellow Mustang that it wasn't running right, but three cars were rented in the space of two days. What was this but an attempt to keep themselves from being detected.

It is respectfully submitted there was more than sufficient evidence upon which to return a verdict of guilty as to both defendants beyond a reasonable doubt.

5. There was no error in Government counsel's argument.

At pages 32 to 34 of Appellant's Opening Brief, Appellants' counsel argues the allegedly prejudicial statements of

Government's counsel in opening argument as being a "gross and direct referral to the fact of this failure to testify is too obvious for comment." Then Appellants' Counsel goes on to argue that Government's counsel committed prejudicial error in stating:

> "Why did they go away from the Border? Why did it take them so long to make the connection, pick up this five ounces of heroin? Well, I submit to you it's logical to argue that that amount of heroin is not easily available even in Nogales, Sonora.
>
> "MR. HEALY: I object to that, your Honor. There is no evidence of that.
>
> "THE COURT: That is outside the record.
>
> "MISS DIAMOS: Your Honor, it was just on the basis—very well." (RT 303, L 16-25)

At the close of Government's Opening Argument, defendants' counsel approached the bench and moved for a mistrial on three grounds (RT 305, L 10-23); the first on allegedly commenting on defendants' failure to testify; the second that five ounces of heroin was a large amount and they would have to wait around to obtain it, and the third, that they were going to take it back to sell it.

With regard to the Government's counsel allegedly commenting on defendants' failure to testify, the statement of Government's counsel should be set in context. From page 289 to 292 of Government's Opening Argument, Government's counsel argued or reviewed what she believed the Court's instructions would be. It was as follows:

> "MISS DIAMOS: May it please the Court, Mr. Healy, ladies and gentlemen of the jury: As you were told before and have been told many times, but as the Court will probably caution you in the instructions, and it's good to repeat it at the opening of every statement by an attorney, what is said by an attorney—either at the time of the opening statement at the beginning of the case or at the

time of argument at the close of the case—is not evidence. It's the testimony of the witnesses and the exhibits that have been admitted into evidence. It isn't that any attorney would try to mislead you; it's that people recall and retain differently, and under the laws of our nation you are the sole judges of the facts and it is what you recall the evidence you heard that will constitute the facts in this case, and not what Mr. Healy, for instance, or myself recall. It's the testimony as you heard it.

"As in any case, civil or criminal, the party who has the burden of proof—that is the plaintiff, the party bringing the action—opens the argument and then closes the argument and rebuts anything the defense brings out in its argument. And in a criminal case the Government bears the burden of proof beyond a reasonable doubt. The Court will instruct you as to the law and as to what reasonable doubt is. The Court will also instruct you as to the elements of the offense." (RT 289, L 6 to 291, L 5)

The Trial Court instructed as follows:

"Heroin is a narcotic drug within the meaning of the statute, and heroin is imported or brought into the United States contrary to law if it is imported or brought in without the Secretary of the Treasury, the Federal Officer, having authorized its importation for delivery to officials of the United Nations, officials of the Government of the United States or officials of the several states of the United States or to any person licensed by the Federal Government for scientific purposes only. In other words, heroin may not lawfully be brought into the United States unless the Secretary of the Treasury has issued a permit for its importation to officials of the United Nations, officials of the United States, officials of a state of the United States, or to a person licensed by the Federal Government to import the heroin for scientific purposes only." (RT 330, L 17 to 331, L 7)

The Trial Court then went on to define and give the elements of both counts. The Trial Court then instructed as follows:

"As to the offense charged in Count Two of the Indictment, I instruct you that when an accused on trial is proved beyond a reasonable doubt to have had possession of heroin, such possession authorizes the jury to draw an inference that the heroin was imported contrary to law and to draw a further inference that such accused had knowledge of such unlawful importation.

"These inferences, if drawn, may be overcome, however, if from the evidence which has been received in this case you are satisfied that the possession of the heroin by the accused did not involve a violation of the statutes either because the heroin was not imported contrary to law or because the accused had no knowedge of its unlawful importation." (RT 337, L 19 to 338 L 6)

It is respectfully submitted the statement of Government's counsel in context does not in any sense constitute a comment on defendants' failure to testify.

With regard to the allegedly prejudicial statement that the five ounces of heroin wasn't available in Nogales, Sonora, was prejudicial, it is respectfully submitted the Court sustained defendants' counsel's objection and told the Jury no basis for it was in the record. However, as shown in the quoted portion above, what counsel was trying to explain was that this was a logical inference from the passage of time that defendants spent in the Nogales area.

In *Washington v. United States* (5th Cir., 1964) 327 F.2d 793, the Government's counsel argued in a case in which the evidence was weak that the government agent acted as an undercover buyer at the risk of his own life and that the people have a right to be secure in their own homes. The Fifth Circuit reversed because of the weakness of the Government's case.

It is respectfully submitted the statements of counsel did not constitute error and if they did, the Government's case was not weak.

6. There was no fatal variance between the dates charged in the Indictment and the proof adduced at trial.

At page 22 of Appellants' Opening Brief, Appellants' counsel argues there was a fatal variance from the proof adduced at trial as compared to the opening date charged in the Indictment, i.e., "Commencing on or about May 26, 1967, and continuing . . ." (RC Item 1, page 1, Line 11).

The proof as to what occurred on May 17 and May 18, 1967, was offered at the time of the hearing on the Motion to Suppress, that is, on August 11, 1967 (M RT 1, L 19). The trial commenced September 8, 1967 (RT 4, L 18).

Defendants' counsel cannot argue surprise as a basis of alleging fatal variance. This was not raised at the hearing on the Motion to Suppress, at trial, nor at the Motion for New Trial.

The difference in dates amounts to nine days. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes that the offense was committed on a date reasonably near the date alleged. *Ledbetter v. United States,* 170 U.S. 606, 612, 18 S.Ct. 774, 776, 42 L.Ed. 1162 (1898).

It is respectfully submitted there was no fatal variance on the opening date as alleged in the Indictment and the proof offered at trial.

VI.

CONCLUSION

It is respectfully submitted there was sufficient evidence properly received at trial to find both defendants guilty of both counts, and the argument of Government's counsel was not error.

Respectfully submitted,

EDWARD E. DAVIS
United States Attorney

Jo Ann D. Diamos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Jo Ann D. Diamos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this 29th day of March, 1968, to:

WILLIAM T. HEALY
1009 Tucson Federal Savings Tower
32 North Stone Avenue
Tucson, Arizona 85701
Attorney for Appellants